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Nos. 89-1714, 90-113, 90-114

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

HARRIET PAULEY, Survivor of JOHN C. PAULEY, *Petitioner*

v.

BETHENERGY MINES, INC., and DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR

CLINCHFIELD COAL COMPANY, *Petitioner*

v.

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR, and JOHN A. TAYLOR

CONSOLIDATION COAL COMPANY, *Petitioner*

v.

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR, and ALBERT C. DAYTON

On Writs Of Certiorari To The United States Courts Of Appeals For The Third and Fourth Circuits

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REPLY BRIEF FOR PETITIONER HARRIET PAULEY (No. 89-1714)

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ARGUMENT

SECTION 402(f)(2) OF THE ACT PROHIBITS THE DIRECTOR FROM APPLYING THE DOL REBUTTAL TEST AT § 727.203(b)(3) TO CLAIMS THAT MEET THE INVOCATION REQUIREMENTS OF THE HEW INTERIM PROVISION.

A. The DOL Interim Regulation's "Disability Causation" Rebuttal Test At § 727.203(b)(3) Is A More Restrictive Criterion Than The Criteria In The HEW Interim Provision.

Respondent Dayton in No. 90-114 has reviewed fully what he accurately describes as the "varying and inconsistent" interpretations of the HEW interim provision that the Director, on the one hand, and the coal companies in Nos. 90-113 and 90-114, on the other, have advanced. Dayton Resp. Br. at 11-14; *see also* Joint Brief For Petitioners Clinchfield Coal Company and Consolidation Coal Company ("Coal Co. Br.") at 26-29 (criticizing, on two independent bases, any approach—like the Director's—that reads § 410.490(b)(2) to authorize a "disability causation" factual inquiry). Illogically, the coal company respondent here, Bethenergy Coal Company ("Bethenergy"), "adopt[s]" the Director's position *and* the conflicting position of its fellow coal companies. Bethen. Resp. Br. at 12, 13. Both positions are wrong.

1. The Text Of The HEW Interim Provision Does Not Contain A "Disability Causation" Factual Inquiry.

a. The Coal Companies' Position. In our opening brief we explained that the parenthetical citations to § 410.412(a)(1) in §§ 410.490(c)(1) and (c)(2) do not implicitly incorporate a "disability causation" rebuttal test like that at § 727.203(b)(3). Opening Br. at 23-26. That explanation, which we originally offered as a refutation of the contrary holding of the court below, *id.*, also became a refutation of the position of the coal companies in Nos. 90-113 and 90-114 when they adopted that holding in their brief. Coal Co. Br. at 28-31.

Except to mischaracterize our reading of the regulatory texts,[1] Bethenergy and its fellow coal companies do not even address our refutation of the Third Circuit's holding and thus of their own position. And because the Director has abandoned the § 410.490(c) parenthetical incorporation theory entirely, *see* Dayton Resp. Br. at 14-15, our explanation has been left unchallenged.[2]

b. The Director's Position. Having abandoned the position he took below, the Director now argues that § 410.490(b)(2), one of the *invocation* subparagraphs of the HEW interim provision, authorizes a "disability causation" factual inquiry like § 727.203(b)(3) both in x-ray cases like this one and in

[1] According to Bethenergy, we argue that § 410.490(c)(2)'s parenthetical citation to § 410.412(a)(1), which in turn parenthetically cites §§ 410.424-410.426, selectively "incorporate[s]" only those portions of §§ 410.424-410.426 "that refer to 'comparable and gainful work.'" Bethen. Resp. Br. at 17 n.14. We made no such argument. Indeed, our position required us to make no explicit argument whatever respecting the parenthetical citation in § 410.412(a)(1) to §§ 410.424-410.426. *See* Opening Br. at 23-26.

[2] Significantly, however, the coal companies in Nos. 90-113 and 90-114 expressly acknowledge that the HEW interim provision does *not* include a "*death* causation" rebuttal test, Coal Co. Br. at n. 38, even though meeting the HEW interim provision's invocation requirements confers presumptions not only of "total disa[bility] due to pneumoconiosis" but also of "*death* . . . due to pneumoconiosis." § 410.490(b) (emphasis added). That the HEW interim provision would lack a "death causation" rebuttal test while nevertheless containing a "disability causation" rebuttal test is counter-intuitive. The natural reading of the HEW interim provision is that it contains neither test.

The coal companies cite *Farmer v. Weinberger*, 519 F.2d 627, 630 (6th Cir. 1975), in which the court held that the HEW interim provision's "disability *severity*" tests at § 410.490(c) could be used to defeat the presumption that the miner died from pneumoconiosis, apparently on the dubious theory that if the miner's impairments were not totally disabling from any cause at the time of his death, he could not have died from pneumoconiosis. Whether or not the court's theory is correct, however, *Farmer* does not even suggest that the HEW interim provision contains any "death causation" rebuttal test that could defeat a claim where the miner's impairments *were* totally disabling at the time of his death.

ventilatory study cases like No. 90-114. Brief for the Director, O.W.C.P. ("Dir. Br.") at 21-24. Section 410.490(b)(2), he says, "is comparable to DOL's third rebuttal method [§ 727.203(b)(3)], since subsection (b)(2) [§ 410.490(b)(2)] speaks of an *impairment* that 'arose out of coal mine employment' while DOL's third rebuttal provision authorizes the coal mine operator to show that the miner's *disability* 'did not arise in whole or in part out of coal mine employment.'" *Id.* at 21-22 (emphasis added). The Director's position thus depends, *inter alia*, on whether the word "impairment" as used in § 410.490(b)(2), which denotes an affliction of some sort, necessarily connotes functional restriction or impediment as well. If the word necessarily has that functional connotation, then it would have a meaning similar to the word "disability" in § 727.203(b)(3).

Significantly, if the Director's position were correct and claimants who satisfy § 410.490(b)(2) thereby prove "disability causation," then Mrs. Pauley has proven "disability causation." For the ALJ concluded that Mr. Pauley's pneumoconiosis arose out of coal mine employment, App. 39 (also stating that Bethenergy had conceded that factual issue), thereby meeting the § 410.490(b)(2) requirement.

The Director's position is wrong, however. Section 410.490(b)(2) expressly states that the particular "impairment" to which it refers is "[t]he impairment established in accordance with paragraph (b)(1) of this section [§ 410.490(b)(1)]." § 410.490(b)(2). Section 410.490(b)(1), in turn, sets forth two distinct classes of impairment—"the existence of pneumoconiosis" as "establish[ed]" by x-ray, biopsy, or autopsy evidence, § 410.490(b)(1)(i), and "the presence of a chronic respiratory or pulmonary disease" as "establish[ed]" by ventilatory study evidence. § 410.490(b)(1)(ii). Based on Mr. Pauley's x-ray evidence, App. 26-27, Bethenergy conceded, and the ALJ found, that the "impairment" that invoked the HEW interim provision in his claim was "the *existence* of pneumoconiosis," App. 39 (emphasis added), an "impairment" that, in any particular claim, may be, but

is *not* necessarily, associated with any functional restriction or limitation. *Oversight of the Administration of the Black Lung Program, 1977: Hearings Before the Subcomm. on Labor of the Senate Comm. on Human Resources*, 95th Cong., 1st Sess. 194 (1977) [hereinafter *1977 Senate Hearings*] (statement of Herbert Blumenfeld, M.D., Chief, Medical Consulting Staff, Bureau of Disability Insurance, SSA); H.R. Rep. No. 563, 91st Cong., 1st Sess. 16 (1969) (testimony, cited in *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1, 7 (1976), presented on behalf of the Surgeon General, stating that physicians do not know whether simple pneumoconiosis, as shown by x-rays, necessarily does or does not produce significant respiratory impairment in a miner); Pemberton, J., *Chronic Bronchitis, Emphysema and Bronchial Spasms in Bituminous Coal Workers*, 13 Arch. Ind. Health 529, 541 (1956) (finding "lack of relationship between respiratory disability and radiologic pneumoconiosis" and citing other studies to same effect); *id.* at 538-42; *see also* Opening Br. at 4 n.5. Consequently, with respect to x-ray cases like Mrs. Pauley's, the Director is wrong in contending that the word "impairment" in § 410.490(b)(2) has the same or similar meaning as the word "disability" in § 727.203(b)(3).[3] The Director's position that § 410.490(b)(2) authorizes a "disability causation" factual inquiry in Mrs. Pauley's case is therefore incorrect.[4]

[3] While "impairment" in § 410.490(b)(2) may have a meaning similar to "disability" in § 727.203(b)(3) in ventilatory study cases, the Director also wrongly contends that § 410.490(b)(2) authorizes a "disability causation" factual inquiry in ventilatory study cases. *See* Dayton Resp. Br. at 18-21.

[4] Contrary to one of Bethenergy's assertions, Bethen. Resp. Br. at 5 n.5, we agree with our fellow claimants in Nos. 90-113 and 90-114 that the presence of pneumoconiosis rebuttal test at § 727.203(b)(4), which is not at issue in Mrs. Pauley's case, is also invalid. Bethenergy's erroneous assertion that we "conce[ded]" the issue in our opening brief is based on confused readings of the HEW interim provision, of *Pittston Coal Group v. Sebben*, 488 U.S. 105 (1988),

(Footnote continued on following page)

2. HEW's Contemporaneous Interpretation Of Its Interim Provision.

The coal companies in Nos. 90-113 and 90-114 say nothing that even arguably contradicts our showing that HEW's Coal Miners' Benefits Manual strongly supports our reading of the HEW interim provision. Indeed, they do not even mention the Manual in their brief. In contrast, the Director affirmatively relies on the Manual, contending that two of its provisions support his reading of the HEW interim provision. Dir. Br. at 22 n.16 & 23 n.18. Bethenergy now adopts the Director's contentions, Bethen. Resp. Br. at 19,[5] both of which, as respondent

[4] *continued*
and of our opening brief. For example, Bethenergy contends that our supposed "concession" rests on the "unstated premise" that claimants in all cases must prove the existence of pneumoconiosis. Bethen. Resp. Br. at 5 n.5. We neither said nor implied anything of the kind. Indeed, we agree with the contrary position of Mr. Dayton in No. 90-114 that the presence of pneumoconiosis is never proven, but is always conclusively presumed, in ventilatory study cases. Dayton Resp. Br. at 11, 28-29.

[5] We answer Bethenergy's further contention that the Manual is not "reliable or meaningful" at pp. 17-18 *infra*.

Mark E. Solomons, who is both the counsel of record for Clinchfield Coal Company in No. 90-113 and "of counsel" for Bethenergy, was the "principal author" of the DOL interim regulation when he was an official of the Department of Labor. 43 Fed. Reg. 17766 (1978). After leaving the Department of Labor, Mr. Solomons wrote an article in which he asserted that §§ 410.490(c)(1) and (c)(2) implicitly incorporate, *inter alia*, a "disability causation" rebuttal test. Solomons, M., *A Critical Analysis of the Legislative History Surrounding the Black Lung Interim Presumption and a Survey of Its Unresolved Issues*, 83 W. Va. L. Rev. 869, 880 (1981). *But see* Prunty, A. and Solomons, M., *The Federal Black Lung Program: Its Evolution and Current Issues*, 91 W. Va. L. Rev. 665, 679 (1989) (more recently equivocal with respect to the position). This view appears to be the premise on which the Director had concluded that the DOL interim regulation would not be "more restrictive" than the HEW interim provision if it were drafted to include an explicit "disability causation" rebuttal test. *See* 43 Fed. Reg. 36826 (1978). It also appears, however, that Mr. Solomons, and thus the Director, were unaware of HEW's Manual when the

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Dayton has explained, are in error. Dayton's Resp. Br. at 24-25.[6]

3. Judicial Interpretations Of The HEW Interim Provision.

The coal companies do not, as they cannot, quarrel with our observation that the hundreds of thousands of § 410.490 cases have not produced even one administrative or judicial decision construing the HEW interim provision to permit a "disability causation" factual inquiry.[7] But they seek

[5] *continued*
DOL interim regulation was drafted. The Manual is not cited in either of Mr. Solomons' articles or in the responses to comments on the DOL interim regulation as proposed. 43 Fed. Reg. 36826 (1978); *see also* Bethen. Resp. Br. at 19 n.18 (disclosing that Mr. Solomons obtained the Manual in response to a Freedom of Information Act request submitted in connection with No. 90-113). If Mr. Solomons and, through him, the Director had been aware of the Manual, which strongly refutes the view that §§ 410.490(c)(1) and (c)(2) implicitly incorporate a "disability causation" rebuttal test, *see* Opening Br. at 26-27, perhaps the DOL interim regulation would not now include the "disability causation" rebuttal test at § 727.203(b)(3) and would comply with Section 402(f)(2) of the Act.

[6] The Director also says that Manual § IB6(e)(3) offers "[s]ome support" for the § 410.490(c) parenthetical incorporation "theory," Dir. Br. at 24 n.19, which he has abandoned but which the court below adopted. App. 17. By its express terms, however, Manual § IB6(e)(3) addresses only the presence of pneumoconiosis and does not pertain to "disability causation" in cases like Mrs. Pauley's in which claimants successfully invoke the HEW interim presumption by proving under § 410.490(b)(1)(i) that they *do* have pneumoconiosis. *See* Opening Br. at 27 n.16.

[7] Bethenergy and the coal companies in Nos. 90-113 and 90-114 nevertheless assert that in *Haywood v. Secretary of Health and Human Services*, 699 F.2d 277 (6th Cir. 1983), HEW "appears" to have "argued" in favor of denying the claim because of the supposed absence of "disability causation." Bethenergy Br. at 18 n.16; Coal Co. Br. at 31 n.37. But the coal companies misrepresent HEW's position in that case. *Haywood* considered the claimant's eligibility not only under the HEW interim provision but also under the entirely separate presumption provision at Section 411(c)(4) of the Act, 30 U.S.C. § 921(c)(4). Unlike the HEW interim provision, the Section 411(c)(4) presumption provision does have

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to explain that fact away by asserting that HEW "made little or no effort to litigate questionable claims and did not assume an adversary's role." Coal Co. Br. at 39; Bethen. Resp. Br. at 18. HEW, however, certainly "assume[d] an adversary's role" in *all* of the hundreds of black lung cases involving the HEW interim provision that found their way to the federal courts. *See, e.g., Mullins Coal Co. v. Director, O.W.C.P.*, 484 U.S. 135, 154 n.27 (1987) (citing 24 such cases); Coal Co. Br. at 17 n.23 & 21 n.28 (citing cases).

4. The Circumstances Attending Adoption Of The HEW Interim Provision.

Bethenergy asserts that one premise on which our entire case depends is the view that because "some unnamed person at SSA" considered it "virtually impossible" to prove or disprove "disability causation," Bethen. Resp. Br. at 18, Congress, or at least the Senate Committee on Labor and Public Welfare, "expected [in 1972] that SSA would eliminate disability causation as a fact element under" the interim criteria that HEW was to promulgate. *Id.* at 14. But we make no such contention. Rather, our position is that HEW's decision in 1972 to have its interim provision conclusively presume "disability causation," besides furthering the Senate Committee's express wishes that HEW's interim criteria be designed to "permit prompt and vigorous processing of the large backlog of claims,"

[7] *continued*
a "disability causation" rebuttal test. HEW therefore argued that the claimant was not eligible under the Section 411(c)(4) provision because in its view the facts established that "disability causation" was absent. With respect to the HEW interim provision, in contrast, HEW contended that the evidence rebutted the presumption only because the claimant lacked the requisite "disability *severity*." *Haywood*, 699 F.2d at 285. That HEW treated the "disability causation" argument selectively, pressing it with respect to the Section 411(c)(4) presumption provision but not with respect to the HEW interim provision, supports our position.

S. Rep. No. 743, 92d Cong., 2d Sess. 18 (1972), was a lawful exercise of the broad rulemaking authority Congress had delegated HEW in 1969. Opening Br. at 29-30, 40 n.25.[8] Moreover, according to the Comptroller General's Report, the view that proving "disability causation" is "virtually impossible," far from being the view of a single individual, was the view of "SSA officials" and "SSA medical officers" and was expressed in the "literature on CWP" as well. *1972 Comptroller General's Report*, p. 8 n.8 *supra* at 31, 32.

While acknowledging the difficulty of determining whether coal mine employment is a cause of a miner's disability if he is impaired by a respiratory impairment, Bethenergy also asserts, without offering any support whatever, that "[i]t is not virtually impossible, or even difficult" to determine whether coal mine employment is a cause of a miner's disability if he is impaired by "an auto accident, gun shot wound or clearly non-respiratory disease." Bethen. Resp. Br. at 8. According to HEW's medical officers, however, the medical conditions that are "virtually impossible" to distinguish from pneumoconiosis as causes of miners' disabilities include not only other respiratory conditions but also a host of *non-respiratory* conditions, among which are "[n]eurological conditions, such as *nerve injuries*, meningitis, and muscular dystrophy;" "[m]uscular conditions, such as polio and *loss of muscular*

[8] Nevertheless, even before HEW promulgated its interim provision, the Comptroller General reported to Congress that HEW's "policy" was to award benefits, without making a "disability causation" factual determination, to disabled claimants who had coal workers' pneumoconiosis and one or more other conditions. General Accounting Office, Report to the Congress: Achievements, Administrative Problems, and Costs In Paying Black Lung Benefits To Coal Miners and Their Widows 33 (1972) [hereinafter *1972 Comptroller General's Report*]. Significantly, after the Comptroller General's Report informed Congress of HEW's "disability causation" policy, Congress did not interfere with the policy either before or after HEW promulgated its interim provision.

strength;" and "[d]egenerative diseases, such as multiple sclerosis, *arthritis*, and arteriosclerotic heart disease." *1972 Comptroller General's Report*, p. 8 n.8 *supra* at 32 (emphasis added).[9] Given this imprecision in the state of the medical art, it would have been surprising indeed if HEW *had* included in its interim provision a "disability causation" inquiry, much less one like the only kind the coal companies say HEW could lawfully have included, an inquiry requiring physicians to opine and adjudicators to decide not merely whether pneumoconiosis was *among* the causes of a miner's disability but, far more precisely than the state of the medical art allowed or yet allows, whether it was the "*primary*" cause of such disability. Coal Co. Br. at 30.

Bethenergy, however, also contends that "[i]t is far more logical to assume that SSA would . . . merely relievf[e] the claimant of the burden of proving "disability causation," Bethenergy Br. at 18, as the DOL interim rebuttal test at § 727.203(b)(3) later did, rather than create a conclusive presumption of "disability causation" for claimants who prove other significant facts. Bethenergy's contention implicitly assumes that HEW would give credence to physicians' opinions regarding whether coal mine employment caused particular miners' disabilities. Actually, however, "it is far more logical to assume" that HEW, having concluded that it was "virtually impossible" to determine the presence or absence of "disability causa-

[9] Based on the medical evidence of record in this case, the administrative law judge found that Mr. Pauley had "several medical problems, including severe arthritis, residual hemiparesis as the result of a stroke, and pulmonary disease," App. 36, and attributed Mr. Pauley's disability to his "arthritis and residual hemiparesis." *Id.* at 39. Mr. Pauley's pulmonary and arthritic conditions are both conditions HEW's medical officers considered "virtually impossible" to distinguish from pneumoconiosis as the cause of a miner's disability; and residual hemiparesis—paralysis on one side of the body—could be as well since it is either a neurological or muscular condition or both.

tion" accurately, would have considered any opinions regarding "disability causation" that physicians nevertheless ventured in the claims of particular miners to be of doubtful reliability at best. Moreover, seeking and evaluating such opinions would have significantly delayed the processing of claims, thereby preventing, or at least greatly interfering with, HEW's ability to reduce the large backlog of unadjudicated claims, which the Senate Committee wanted the HEW interim criteria to do. *See* Opening Br. at 29-30.

In his opening brief, the Director based his reading of § 410.490 in part on the ground that this Court presumes that federal agencies act lawfully, while our interpretation, he contended, requires the conclusion that HEW, in promulgating and applying § 410.490, violated the Act. Dir. Br. at 24-25. We anticipated and refuted that argument in our opening brief. Opening Br. at 40 n.25. Supplementing that refutation are the decisions of this Court that uphold, as proper exercises of agency rulemaking power, federal program regulations that, like the HEW interim provision, preclude "individualized findings of fact" respecting one or more elements of a claim for benefits or program coverage, *Schweiker v. Gray Panthers*, 453 U.S. 34, 48 (1981), in order that the program be administered efficiently or effectively. *E.g.*, *Bowen v. Yuckert*, 482 U.S. 137, 150-53 (1987); *Gray Panthers*, 453 U.S. at 43-50; *Mourning v. Family Publications Service*, 411 U.S. 356, 369-75 (1973); *see also* Opening Br. at 38-43.[10]

[10] Also supplementing our refutation of the Director's contention is Section 402(f)(1)(B), 30 U.S.C. § 902(f)(1)(B), which Congress enacted together with Section 402(f)(2) as part of the Black Lung Benefits Reform Act of 1977, Pub. L. 95-239, § 2(c), 92 Stat. 95 (1978). The text of Section 402(f)(1)(B) demonstrates that when Congress wished to limit agency rulemaking authority to define "total disability" by disallowing "conclusive" presumptions of fact, it did so expressly. No such limitation attached to Congress' delegation of rulemaking authority to HEW in 1972, when the HEW interim

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B. The Disability Causation Rebuttal Test At § 727.203(b)(3) Violates Section 402(f)(2) Of The Act.

1. In his opening brief, the Director, emphasizing that Section 402(f)(2) refers to "criteria *applicable* to a claim filed on June 30, 1973," framed the statutory question here as "what criteria Congress *understood* to apply to Part B claims, not what criteria HEW *actually applied*." Dir. Br. at 25 (emphasis added). Respondent Dayton has read the Director's contention to be simply that no weight should be given to how HEW actually "implemented" or "put into effect" its interim provision if such implementation differed from the terms of the provision themselves. Dayton Resp. Br. at 32. We believe that reading is a reasonable one and that respondent Dayton's response to it, *id.*, is correct. It is possible, however, to read the Director's contention as advancing the much more ambitious position that no weight need be given even to the terms of the HEW interim provision themselves. For if Congress' *understanding* of the criteria applicable to Part B claims were somehow decisive, and if Congress *understood* the HEW interim provision not to include a "disability causation" factual inquiry, then that *understanding* would control regardless of the actual terms of the provision.

If the Director's argument is as broad as we suggest it might be, then it is one that is both inconsistent with well-established principles of statutory construction and wrong on its own terms.

[10] *continued*
provision was promulgated. 30 U.S.C. § 902(f) (1970); 30 U.S.C. § 921(b) (1970).

Even if the HEW interim provision had transgressed the bounds of the exceptionally broad rulemaking authority HEW enjoyed when it promulgated that regulation, Congress later cured the defect, when, as we explain more fully at p. 13 *infra*, it elevated the HEW interim provision to statutory status in Section 402(f)(2). *See, e.g., Silas Mason Co. v. Tax Comm. of Washington*, 302 U.S. 186, 208 (1937).

a. This Court "sit[s] . . . to apply what Congress enacted. . . ." *Sebben*, 488 U.S. at 118. Accordingly, "[i]n the absence of a 'clearly expressed legislative intention to the contrary,' the language of the statute itself 'must ordinarily be regarded as conclusive.' " *United States v. James*, 478 U.S. 597, 606 (1986), *quoting Consumer Products Safety Comm'n v. GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980). Moreover, when "the terms of a statute [are] unambiguous," only "rare and exceptional circumstances" will justify overriding the "application of the statute as written." *Demarest v. Manspeaker*, 59 U.S.L.W. 4047, 4049 (U.S. January 8, 1991). These principles define a crucial interpretive distinction between, on the one hand, what the language of the statute means and, on the other, what the legislature means or, as the Director puts it, "understands." What the language of the statute means is ordinarily "conclusive." *Consumer Products Safety Comm'n*, 447 U.S. at 108. In contrast, what the legislature means is never conclusive, is almost always "irrelevant" if the statutory language is unambiguous, *Burlington No. R. Co. v. Okla. Tax Comm'n*, 481 U.S. 454, 461 (1987), and comes into play only when it is "clearly expressed" and contrary to the "language of the statute itself." *James*, 478 U.S. at 606; *see also* Holmes, O. W., *The Theory of Legal Interpretation*, 12 Harv. L. Rev. 417, 419 (1899) (Justice Holmes, before his appointment to this Court, stating, "[w]e do not inquire what the legislature meant; we ask only what the statute means").

The controlling statutory question here is therefore not "what criteria Congress *understood* to apply to Part B claims," as the Director says, Dir. Br. at 25 (emphasis added), but what Section 402(f)(2)'s phrase "criteria applicable to a claim filed on June 30, 1973" means. *Sebben* itself makes the point. There the Court sought to discern "the meaning" of "the statute," *Sebben*, 488 U.S. at 113, identifying what the "criteria applicable to a claim filed on June 30, 1973" actually were, not what Congress supposedly "understood" those criteria to have been. *Id.* at 113-18. Moreover, *Sebben* held that the language in Section 402(f)(2) referring to the "criteria applicable to a claim filed on June 30, 1973" encompassed, among other Part B eligibility criteria, the actual "standards . . . of the interim HEW regulation." *Id.* at 113-14; *see also id.* at 109 (citing the regulatory terms themselves). We are therefore correct in maintaining, and the Secretary is wrong if he disputes, that "Congress elevated the [terms of the] HEW interim provision to statutory status when it decreed in Section 402(f)(2) that the HEW interim provision set the statutory standard of restrictiveness for the 'criteria' the Secretary of Labor could apply." Opening Br. at 39 (emphasis omitted).

Ironically, the sources that the Director must explore in order to show that Congress "clearly expressed" an "understanding" contrary to the statutory language in Section 402(f)(2) further support our position, not his. The legislative history of the 1978 amendments establishes that Congress was concerned that HEW, in adjudicating cases under the HEW interim provision, did not always consider the medical evidence pertinent to the express rebuttal criteria. *Mullins Coal Co. v. Director, O.W.C.P.*, 484 U.S. 135, 149-50 (1987). Section 402(f)(2) therefore provided that the "criteria *applicable* to a claim filed on June 30, 1973," rather than the criteria "*applied*" on that date, define the statutory standard of restrictiveness under that provision because Congress was dissatisfied with HEW's "actual application" of the HEW interim provision, not with the terms of the HEW interim provision themselves. In short, the word "applicable" did not authorize DOL to modify, or apply provisions other than, the terms of the HEW interim provision themselves.

b. Even on its own terms—*i.e.*, looking to what Congress "understood" Section 402(f)(2) to mean rather than to what the language of the Section actually means—the

Director's position is incorrect, as respondent Dayton explains. Dayton Resp. Br. at 31-37. We adopt his argument and make two supplemental points here.

First, the Director's contention that Congress could not have "understood" the "criteria applicable to a claim filed on June 30, 1973" to authorize benefits absent a "disability causation" factual inquiry is properly understood as a variant of his contention in *Sebben* that a particular criterion should be excluded from the ambit of the term "criteria" in Section 402(f)(2). *See Sebben*, 488 U.S. at 114-15. The Director's position is therefore contradicted by the showing in our opening brief at pages 30-31 that the term "criteria" in Section 402(f)(2) is best read as referring to *all* criteria of the HEW interim provision, not merely to "total disability" criteria, much less to "disability severity" criteria, a subset of "total disability" criteria. That showing is buttressed by the fact that invoking the HEW interim provision confers presumptions not only of "total[ ] disab[ility] due to pneumoconiosis," but also of "*death* . . . due to pneumoconiosis." § 410.490(b) (emphasis added). Section 402(f)(2)'s phrase "criteria applicable to a claim filed on June 30, 1973" therefore necessarily refers to "criteria" pertaining to "death" as well as "criteria" pertaining to "total disability." Accordingly, the suggestion that Congress "understood" the word "criteria" in Section 402(f)(2) to be limited to a subset of "total disability" that excludes the "disability causation" criterion, is implausible.

Second, in *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1 (1976), this Court considered Section 411(c)(3) of the Act, which confers the irrebuttable presumption of "total disability" due to complicated pneumoconiosis, and concluded that because Section 411(c)(3) does not address "disease causation," claimants who satisfy it are eligible for benefits only if they also satisfy the "disease causation" requirement of other sections of the Act. 428 U.S. at 22 n.21. The Director characterizes this conclusion as a "gloss on the statute," Dir. Br. at 28, of which Congress must have been "aware" when it enacted Section 402(f)(2), *id.* at 17-18, and urges the Court to apply a similar "gloss on the statute in construing Section 402(f)(2) as well." *Id.* at 28. The Director, however, mischaracterizes the Court's treatment of Section 411(c)(3) in *Turner Elkhorn Mining* as a "gloss on the statute." Section 411(c)(3) does not purport to resolve all elements of a claim by itself any more than its companion provision at Section 411(c)(1), which addresses neither "disability severity" nor "disability causation," purports to do so.[11] Thus, the Court did not place a "gloss" on Section 411(c)(3) any more than it would be placing a "gloss" on Section 411(c)(1) if it concluded, as would be proper, that claimants who satisfy Section 411(c)(1) are eligible for benefits only if they also satisfy the "disability severity" and "disability causation" requirements of other sections of the Act. Unlike Sections 411(c)(1) and (c)(3), however, Section 402(f)(2), which incorporates all Part B criteria, *does* purport to resolve all elements of a claim by itself. The Court's treatment of Section 411(c)(3) in *Turner Elkhorn Mining* therefore offers no support for the Director's position.

2. In our opening brief, we emphasized that Section 402(f)(2) was a compromise measure. Opening Br. at 7-13, 41-43. Although Bethenergy acknowledges that fact, Bethen. Resp. Br. at 8, it quarrels with our characterization of the "compromise" as one between "coal industry" and "coal miner" proposals. *Id.* at 6. However, Bethenergy

[11] HEW's permanent regulations therefore recognize that claimants who successfully invoke the Section 411(c)(3) presumption must still prove "disease causation" in order to establish their eligibility for benefits, § 410.418 (implementing Section 411(c)(3)); §§ 410.416, 410.456 (both requiring proof of "disease causation"), just as claimants who successfully invoke the Section 411(c)(1) presumption must still prove both "disability severity" and "disability causation" in order to establish their eligibility. §§ 410.416, 410.456 (both implementing Section 411(c)(1)); §§ 410.412, 410.422-410.426 (all requiring proof of "disability severity" or both "disability severity" and "disability causation").

says nothing that counters the account set forth in our opening brief at pages 8-12, showing our characterization to be accurate.[12]

3. Describing our position as predicated in part upon the contention that the "1977 Congress" was "aware" that there was no "disability causation" factual test in the HEW interim provision, Bethenergy condemns the contention as "undocumented." Bethen. Resp. Br. at 15. However, because the language of Section 402(f)(2) itself forbids the Secretary of Labor from making "criteria" that are "more restrictive" than those in the HEW interim provision "applicable" to specified claims, *see* p. 13 *supra*, it is irrelevant whether Congress was in fact "aware" that one result of that textual directive would be to require the Secretary of Labor to presume "disability causation" conclusively. *See Griffin v. Oceanic Contractors, Inc.*, 458 U.S. 564, 576 (1982). Moreover, we have not argued that the Congress that enacted Section 402(f)(2) was *in fact* "aware" that there was no "disability causation" factual test in the HEW interim provision. Opening Br. at 44 n.28. We pointed out, however, that under the decisions of this Court a *judicial presumption* that Congress *was* "aware" that the HEW interim provision did not include a "disability causation" inquiry arose when

[12] Bethenergy says that in 1977, when Congress was considering amendments to the Act, "[n]either the coal industry nor the insurance industry . . . proposed any eligibility amendments to the existing 1972 statute." Bethen. Resp. Br. at 6. But the Black Lung Program under the "1972 statute," so far as it affected the coal and insurance industries (*i.e.*, the Part C black lung program), was one under which DOL approved less than ten percent of filed claims. *See* Opening Br. at 8. It would therefore have been astonishing if the coal or insurance industries had proposed any amendments to the 1972 statute. Short of eliminating the program entirely, it is difficult to see what advantage any amendment would have secured for them. Moreover, they actively opposed Section 7 of H.R. 4544 (1977), the "coal miner's" proposed amendment. *E.g.*, *1977 Senate Hearings*, p. 4 *supra* at 91 (statement of Carl E. Bagge, President, National Coal Association).

Congress enacted Section 402(f)(2). Opening Br. at 27 n.17 & 44 n.28, *citing, inter alia, Aluminum Co. v. Central Lincoln Peoples' Util. Dist.*, 467 U.S. 380, 392 n.8 (1984) ("improvident" to assume Congress was unaware of contractual terms incorporated by reference into statute).

C. The Secretary Of Labor's Latest Interpretations Of The HEW Interim Provision And Section 402(f)(2) Are Not Entitled To Deference.

Neither the Director nor any of the coal companies says anything to refute respondent Dayton's argument that the Secretary of Labor's interpretations of the HEW interim provision and Section 402(f)(2) of the Act are not entitled to deference. Dayton Resp. Br. at 38-44; *see also* Opening Br. at 27 n.17. We adopt Mr. Dayton's analysis.

As we explained in our opening brief at pages 26-27, the Secretary of *HEW's* contemporaneous interpretation of his interim provision, which he set forth in Part IV of HEW's Coal Miner's Benefits Manual (the "Manual"), supports our position. Bethenergy's response, that the Manual is "not a reliable or meaningful source of authority for any purpose," Bethen. Resp. Br. at 19, does not wash. While Bethenergy correctly observes that no deference would be owed the Manual if it were inconsistent with published regulations or the Act, *id.*, neither the Director nor any of the coal companies is able to show any such inconsistency. Bethenergy also says that the Manual was not the only evidence of HEW's view and that other "rulings" or "practices" may have evidenced different views than the Manual sets forth. Bethen. Resp. Br. at 19. But Bethenergy cannot advance its cause by rank speculation about supporting authority that even it acknowledges may not exist. Bethenergy further asserts that the Manual was not "generally a public document" and that there is no evidence that "anyone outside of SSA knew of its contents." Bethen. Resp. Br. at 19. But the Manual *is* a "public document," having always "been avail-

able for public inspection and copying" under the Freedom of Information Act. 5 U.S.C. §§ 552(a)(2)(B), (C) (1988). To be sure, the Manual was not published in the Code of Federal Regulations. But the deference accorded an agency interpretation is not determined by whether it is set forth in a published regulation. *See Miller v. Youakim*, 440 U.S. 125, 143-44 (1979) (HEW "Program Instruction"); *New York Dept. of Social Services v. Dublino*, 413 U.S. 405, 420 (1973) (HEW's approval of state plans).

D. An Individual Coal Operator Who Shows Under Section 422(c) That Its Mines Did Not Cause The Disability Of The Miner, Thereby Shifts Liability To The Black Lung Disability Trust Fund For Payment Of Benefits To A Claimant Who Prevails Under Section 402(f)(2) And The HEW Interim Provision.

In our opening brief we pointed out that the Act and regulations establish an eligibility/liability dichotomy in which the function of Section 422(c) of the Act is to determine whether the benefits to a claimant already found eligible for them under the separate *eligibility* provisions of the Act (*e.g.*, under Section 402(f)(2) and the HEW interim provision) are to be paid by one or more coal mine operators or instead by the Black Lung Disability Trust Fund. Opening Br. at 46.[13] Although Bethenergy claims that it disagrees, Bethen. Resp. Br. at 22, its response is merely that "[t]here is no source of authority to justify an interpretation of Part C to require or permit the application of

[13] In that context, we also pointed out that, at the time *Turner Elkhorn Mining* was decided, operators who successfully avoided liability under Section 422(c) also defeated the claim because the Trust Fund did not then exist. Opening Br. at 47 n.30. Bethenergy says that this contention is wrong, citing 30 U.S.C. § 934 (1970). Bethenergy Resp. Br. at 22 n.20. However, that 30 U.S.C. § 934 (1970) authorized the Secretary of HEW to pay benefits when a responsible operator could not be found or would not pay does not suggest that we erred in maintaining that, in cases in which responsible operators *could* be found and *would* pay, the operators' avoidance of liability under Section 422(c) also defeated the claims prior to the creation of the Trust Fund.

various *eligibility* rules depending on whether a mine operator or the Trust Fund will pay the benefits awarded." Bethen. Resp. Br. at 20 (emphasis added). We agree: our position is precisely that Section 422(c) is not an eligibility provision but only addresses which entity as between one or more coal mine operators or the Trust Fund is *liable* for an eligible claimant's benefits.[14]

Bethenergy speculates that our reading of Section 402(f)(2), joined with our reading of Section 422(c), would encourage administrative law judges to please each claimant by finding him eligible and simultaneously to please each coal mine operator by exonerating it from liability. Bethen. Resp. Br. at 21 n.19. This immensely cynical view of administrative law judges is, however, totally without support anywhere, much less in the record here. Moreover, Bethenergy's speculation ignores its own acknowledgement,

[14] Bethenergy is mistaken if it means to contend further that Section 422(c) and its implementing regulations are both eligibility and liability provisions. If Section 422(c) were an eligibility provision, it would impose the absurd and restrictive requirement as to each Part C claim that the claimant is not eligible for benefits unless his totally disabling pneumoconiosis were proven, or were conclusively presumed, to have arisen not merely out of coal mine employment in general—as Sections 401(a), 402(f)(1)(A), and 411(a) and (b) suggest or require—but out of employment "in a mine during a period . . . *when it was operated by [a particular] operator.*" 30 U.S.C. 932(c) (emphasis added).

Moreover, the result would not change even if Section 422(c) could somehow plausibly be construed as an eligibility provision. When Section 402(f)(2) became law, the Secretary of Labor's rulemaking authority was as broad as the rulemaking authority the Secretary of HEW had enjoyed in promulgating the HEW interim provision. 30 U.S.C. § 902(f)(1) (1976 & Supp II 1978); 30 U.S.C. § 932(h) (1976). Accordingly, the Secretary of Labor's rulemaking authority clearly authorized a rule that, like the HEW interim provision, conclusively presumed "disability causation" for Section 402(f)(2) claims adjudicated under a Section 422(c) "eligibility" provision as posited. *See* Opening Br. at 40, n.25. And if Section 422(c) were an "eligibility" provision, the Secretary would have been bound to promulgate such a rule in order to comply with Section 402(f)(2)'s "not . . . more restrictive" mandate.

Bethen. Resp. Br. at 21, that the Secretary of Labor is also a party to all Part C claims, 30 U.S.C. § 932(k), and, pursuant to Section 422(a), 30 U.S.C. § 932(a), "has all of the defensive rights available to an employer and insurance carrier." Bethen. Resp. Br. at 21. Indeed, if grounds exist to contest a claimant's eligibility in a particular claim as to which the Trust Fund may be liable, the Secretary is obligated to contest it because she is also a trustee for the Trust Fund. 26 U.S.C. § 9501(a)(2) (1988).

CONCLUSION

The judgment of the Court of Appeals for the Third Circuit should be reversed and the case remanded with directions to award Mrs. Pauley black lung benefits.

Respectfully submitted,

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